Nos. 97-0400 and 97-0430

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ESSEX COUNTY UTILITIES AUTHORITY, HUDSON COUNTY IMPROVEMENT AUTHORITY, MERCER COUNTY IMPROVEMENT AUTHORITY, PASSAIC COUNTY UTILITIES AUTHORITY, *et al.*,
Petitioners,
v.
ATLANTIC COAST DEMOLITION & RECYCLING, INC., *et al.*,
Respondents.

ROBERT C. SHINN, JR., individually and in his capacity as Commissioner of the New Jersey Department of Environmental Protection,
Petitioner,
v.
ATLANTIC COAST DEMOLITION & RECYCLING, INC.; C & A CARBONE, INC.; NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR C & A CARBONE, INC., NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, AND WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY IN OPPOSITION

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PASSAIC COUNTY UTILITIES AUTHORITY, *et al.*,
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BRIEF FOR C & A CARBONE, INC., NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, AND WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY IN OPPOSITION

Respondents C & A Carbone, Inc., the National Solid Wastes Management Association, and the Waste Management Association of New Jersey ("Carbone Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari filed by Petitioner Robert C. Shinn, Jr. ("Commissioner," "New Jersey," or "the State") and the Petition for Writ of Certiorari filed by Petitioners Essex County Utilities Authority, Hudson County Improvement Authority, Mercer County Improvement Authority, and Passaic County Utilities Authority ("County Authorities").[1]

STATEMENT OF THE CASE

These cases involve constitutional challenges to the State of New Jersey's solid waste flow control regulations under the dormant Commerce Clause. Respondent Atlantic Coast Demolition & Recycling, Inc., a Pennsylvania corporation, brought this action in 1993 seeking declaratory and injunctive relief. The district court analyzed New Jersey's solid waste regulations under the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and entered judgment in favor of defendants. Atlantic Coast appealed.

During the pendency of the appeal, this Court decided *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). In *Carbone*, the Court found that a local flow control ordinance discriminated against interstate commerce because it "hoards solid waste, and the demand to get rid of it, for the benefit of" local business. *Id.* at 392. It could thus be upheld only if the municipality could "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* The Court rejected the public health, environmental, and financial justifications offered in support of the ordinance and determined that the Clarkstown ordinance

[1] For the Carbone Respondents, there are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.6 of this Court.

could not survive strict scrutiny and was unconstitutional. *Id.* at 393-94.

The court below recognized in its 1995 decision that the principles announced in *Carbone* had a direct bearing on the outcome of the case. Pet. App. 22.[2] Noting that "New Jersey's flow control regulations accomplish on a district level substantially what Clarkstown's flow control ordinance accomplished on a local level," *id.* at 27, the Third Circuit concluded that New Jersey's flow control regulations "discriminate against interstate commerce and that heightened scrutiny under the dormant Commerce Clause is required." *Id.* at 20. It considered the State's claim to market participant status, but found that "New Jersey's waste flow control regulations were . . . promulgated by it in its role as a market regulator, not in its capacity as a market participant." *Id.* at 39. The Third Circuit remanded the case to the district court with instructions to apply the strict scrutiny test and to provide the State an opportunity to prove that it lacked any nondiscriminatory means for achieving its legitimate goals. *Id.* at 40-42.

The Carbone Respondents, meanwhile, had filed a similar challenge to New Jersey's flow control regulations, which had been stayed pending the Third Circuit's 1995 decision. The two cases were consolidated on remand. After extensive proceedings, the district court concluded that the State and its allies had "not even come close to proving that a constitutional, nondiscriminatory alternative cannot address the various interests identified [by them] as well or better than the current flow control regulations." Pet. App. 272.[3] The district court thus de-

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[2] The content and pagination of the appendices filed by Commissioner Shinn and the County Authorities are identical. Therefore citations in this brief to "Pet. App." refer to the two appendices interchangeably.

[3] The district court and the Third Circuit both found that tipping fees in New Jersey are set well above market rates for solid waste disposal. Pet. App. 13, 267.

cared the flow control regulations unconstitutional and enjoined their enforcement. *Id.* at 291-93. However, the district court—without conducting further evidentiary proceedings—simultaneously stayed its injunction for a period of two years following the completion of all appeals and petitions to this Court. *Id.* at 291-92.[4]

New Jersey and the County Authorities appealed that portion of the judgment declaring the flow control regulations unconstitutional. The Carbone Respondents appealed that portion of the judgment that imposed the two-year post-appeal stay. On appeal, the Third Circuit affirmed the district court's factual determination that nondiscriminatory alternatives to flow control are available to the State and the County Authorities, and its conclusion that the flow control regulations were thus unconstitutional. Pet. App. 130, 133-34, 138. The court below reversed the district courts' two-year post-appeal stay, concluding that "[w]hatever the district court's power may be to delay constitutional relief, none of the justifications raised by the defendants support the extraordinary act of delaying the injunction of an unconstitutional law." *Id.* at 143.

REASONS FOR DENYING THE WRIT

The Petitions meet none of this Court's criteria for the exercise of its certiorari jursdiction. The Third Circuit's decisions involve the straightforward application of the Commerce Clause principles enunciated in *Carbone* to a solid waste regulatory scheme that similarly discriminates against interstate commerce. There is no circuit conflict on any of the questions raised in the Petitions; the purported conflicts cited in the County Authorities's Petition

[4] The injunction was made effective immediately with respect to construction and demolition waste, a small percentage of New Jersey's total solid waste stream and the portion contested by Atlantic Coast Demolition & Recycling, Inc. The two-year post-appeal stay of the injunction was applied to all other types of solid waste, representing almost 90 percent of the solid waste stream. Pet. App. 291-93.

(at 13-16) involve cases fully consistent with the Third Circuit's decisions or factual circumstances not present in this case. Nor is there any inconsistency between this Court's Commerce Clause jurisprudence and its public utility jurisprudence, as alleged in the Petitions. In their attempt to identify a conflict or inconsistency where none exists, the County Authorities are really seeking an advisory opinion from this Court regarding the constitutionality of factual scenarios and regulatory alternatives not at issue in this case. There is no reason for this Court to undertake such an evaluation.

Furthermore, the Petitions do not raise questions of recurring or widespread national importance. New Jersey's solid waste regulatory system differs markedly from the approach taken by other states, and thus a decision on the merits would be limited to the unique facts of this case. The Third Circuit did not break any new ground, but followed settled precedent when it applied the principles set down in *Carbone* to the facts of this case, rejected the public utility and market participant arguments, and vacated the post-appeal stay. There is no occasion for further review by this Court.

I. THE PUBLIC UTILITY ARGUMENTS RAISED BY PETITIONERS PRESENT NO ISSUE THAT WARRANTS REVIEW BY THIS COURT.

Petitioners seek to avoid the clear teachings of *Carbone* by arguing that their flow control regulations must be judged by a more lenient standard because New Jersey has chosen to utilize a public utility model of regulation for solid waste. Petitioners maintain that public utility regulations, by definition, are exempt from the strict scrutiny applicable to other discriminatory state regulations, and subject to review only under the less stringent balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The court below rejected this argument:

> [W]e do not read the dormant Commerce Clause jurisprudence to suggest that state utility regulation is to be judged by different standards than other

> state regulation. When state utility regulation is protectionist, the Supreme Court has employed heightened scrutiny; where it is not, a benefits and burdens analysis has been applied.

Pet. App. 29.

The Third Circuit's conclusion comports with this Court's admonition in *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983), that: "Our constitutional review of state utility regulation in related contexts has not treated it as a special province insulated from our general Commerce Clause jurisprudence." *See also Wyoming v. Oklahoma*, 502 U.S. 437, 454-59 (1992), and *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 (1982) (applying heightened scrutiny to invalidate discriminatory state public utility regulations).

The Court's recent decision in *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997), is in no way inconsistent. In *Tracy*, this Court specifically reaffirmed *Arkansas Electric*, noting that state utility regulation "is not, as a constitutional matter, immune from our ordinary Commerce Clause jurisprudence." *Id.* at 820 n.8. The Court made clear that "if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny. . . . ." *Id.* at 828 n.15. The *Pike* test, on the other hand, was described in *Tracy* as the standard used to evaluate "nondiscriminatory state legislation" under the dormant Commerce Clause. *Id.* at 824 n.12. In sum, nothing in this Court's decision in *Tracy* is inconsistent with the Third Circuit's application of strict scrutiny to New Jersey's discriminatory flow control regulations.

Nor is there any inconsistency between the findings of the court below and this Court's public utility decisions. The court below applied strict scrutiny only after it found that "New Jersey's waste flow regulations, in effect and

by design, discriminate against interstate commerce. . . ." Pet. App. 20. This finding was amply supported by the State's own solid waste management plan, which provides that it is " 'a key policy objective' " of New Jersey to achieve "self-sufficiency in disposal capacity. The Department's objective is to eliminate reliance on out-of-state disposal within a seven-year period." *Id.* at 14 (internal citations omitted). The court below found that "NJDEP's policy of attaining self-sufficiency has favored operators that have facilities within the state or that are willing to construct a facility there." Pet. App. 113; *see id.* at 15.[5] This finding amply supports the lower court's conclusion that New Jersey's regulations discriminate against interstate commerce.

In contrast, the Court in *Tracy* found that the plaintiff had failed to prove discrimination, expressly noting that the Ohio courts "might well extend the challenged exemption to out-of-state utilities if confronted with the question." *Tracy*, 117 S. Ct. at 830.[6] Similarly, in *Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 336 (1951), the Court found "no discrimination against interstate commerce."[7] Given this different factual premise, there is no inconsistency between *Tracy's*

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[5] The State unequivocally reaffirms these policy objectives in its Petition. Shinn Pet. at 5.

[6] The record in *Tracy* established that a Pennsylvania public utility that sold gas to Ohio consumers qualified for the challenged exemption under an Ohio Board of Tax Appeals ruling. *Id.*

[7] *Id.* at 336. The Court in *Tracy* also emphasized that more than a half-century ago it had concluded that Congress itself had "exempt[ed] state regulation of instate retail natural gas sales from the dormant Commerce Clause" through the Natural Gas Act, and that in the years since that decision, Congress had "only reaffirmed the power of the States in this regard." 117 S. Ct. at 829. This recognition of local regulatory authority in the natural gas area by Congress—the ultimate arbiter of state power under the dormant Commerce Clause—finds no comparable analog in the area of solid waste disposal.

application of the balancing test and the application of strict scrutiny here.

Consistent with these authorities, the Third Circuit recognized that the State and the County Authoriies "remain free to regulate the flow of waste within New Jersey so long as the State's laws and regulations treat in-state and out-of-state facilities equally." Pet. App. 141. The County Authorities agree that the State may retain its waste flow system "as long as it adheres to non-discriminatory procurement procedures." County Authorities Pet. at 13-14. Thus New Jersey is perfectly free to continue its public utility model of regulation if it so chooses, as long as those regulations do not discriminate against interstate commerce. New Jersey's existing flow control regulations, however, require that

> those who supply disposal services at the retail level . . . secure processing and disposal services from the designated, franchised facility and out-of-state disposal firms are thus excluded not only from the market for such services during the franchise period *but also from competing for the franchise.*

Pet. App. 33-34 (emphasis added). Thus, unlike the public utility regulations that have been upheld by this Court, New Jersey's flow control regulations plainly discriminate against interstate commerce and were properly subjected to strict scrutiny by the court below.

There is also no inconsistency between *Carbone* and *Tracy*. The *Carbone* decision was predicated on a finding of discrimination against interstate commerce (*Carbone*, 511 U.S. at 391), whereas in *Tracy* discrimination was not proven. *Tracy*, 117 S. Ct. at 829-30. This critical factual distinction is what led to the application of different levels of scrutiny in *Carbone* and *Tracy*, and there is no "confusion" in the two cases.[8]

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[8] Transportation of natural gas is fundamentally different from the collection and disposal of solid waste, and is, in many respects, *sui generis*. Because natural gas can only be transported in large quantities by pipeline, the Court in *Tracy* recognized that for most

Finally, the public utility arguments raised by Petitioners do not present issues of recurring or widespread national importance. As New Jersey itself admits, "other states have not relied upon a utility model to deliver disposal services." Shinn Pet. at 15. Thus, New Jersey stands alone as the only state that comprehensively regulates solid waste disposal as a public utility on a statewide basis and the public utility issues raised by it have no significance beyond the unique factual circumstances of this case.[9] The Third Circuit has properly applied this Courts' existing precedent to these facts and there is no occasion for further review by this Court.

II. THE STATE'S CLAIM OF MARKET PARTICIPANT STATUS RAISES NO ISSUE WORTHY OF REVIEW.

Petitioners also urge review of the lower court's finding that New Jersey's waste flow regulations are not immune from Commerce Clause scrutiny under the market participant doctrine. The Third Circuit's conclusion that New Jersey is not a "market participant" was based on a solid application of this Court's market participation jurisprudence to the facts of this case and there is no need for further review.

The Third Circuit initially noted that there are "two important characteristics" present in every case where this Court has found the market participant doctrine to be

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of this century the "market structure [for natural gas sales] virtually precluded competition for LDCs and other potential [out-of-state] suppliers of natural gas for direct sales to customers. . . ." *Tracy*, 117 S. Ct. at 821. In its solid waste decisions over the past 20 years, this Court has never indicated that transportation constraints or the market structure of the solid waste collection and disposal industry precluded competition in this area. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992).

[9] The unique factual circumstances underlying New Jersey's solid waste regulatory scheme contrast sharply with the situation presented in *Tracy*, where the Court found that all 50 States regulate natural gas utilities. *Tracy*, 117 S. Ct. at 822 & n.10.

applicable: in each case, "the government was participating directly in some aspect of the market as a purchaser, seller, or producer, and the alleged discriminatory effects on the interstate market flowed from those market actions." Pet. App. 35. Citing *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), it correctly emphasized that "[w]hen a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market." Pet. App. 38.

The Third Circuit then analyzed the facts concerning New Jersey's waste flow regulations and concluded that they simply did not fit within the market participant concept:

> The waste flow regulations purport to control the market activities of private market participants. Those regulations do not concern only the manner of operation of the government-owned or government-managed designated disposal facilities; they require everyone involved in waste collection and transportation to bring all waste collected in the district to the designated facilities for processing and disposal. They do not merely determine the manner or conditions under which the government will provide a service, they require all participants in the market to purchase the government service—even when a better price can be obtained on the open market. New Jersey's waste flow control regulations were thus promulgated by it in its role as a market regulator, not in its capacity as a market participant.

Pet. App. 39.[10]

In its Petition, the State is essentially asking this Court to overturn these factual findings with respect to the

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[10] In addition, each County Authority may choose either a "private or public entity to service its waste disposal needs." Pet. App. 112.

scope of New Jersey's waste flow regulations. But there is no reason for this Court to become involved in such a fact-intensive inquiry. In any event, the Third Circuit's findings are fully supported by the record. Although New Jersey claims that it has "removed solid waste disposal services from the commercial arena entirely by providing for those services itself," and that its system is comprised of "publicly-owned solid waste facilities" (Shinn Pet. at 14; *see also id.* at 5), the record below confirms that private firms own and operate solid waste disposal facilities, transfer stations, and recycling facilities in New Jersey,[11] and provide most of the solid waste collection and transportation services in New Jersey.[12] In recent amendments to its flow control regulations, New Jersey conceded that there are "approximately 34 public and *private* disposal facilities in New Jersey," and "approximately 500 commercial solid waste collection and transportation companies" affected by New Jersey's solid waste regulations. 29 N.J. Reg. 4170, 4179 (Sept. 15, 1997) (emphasis added). The County Authorities represent that New Jersey has "declared all solid waste collection and disposal operators in the State, both public and *private*, to be public utilities, and regulated them as such," thus implicitly admitting that New Jersey is acting as a market regulator, rather than as a market participant. County Authorities Pet. at 8 (emphasis added).[13]

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[11] (App. (1997) A-429 & A-897-899 (private disposal facilities); App. (1997) A-471 & A-789 (private transfer stations); App. (1997) A-893-94 & A-1202 (private recycling facilities).) Citations to "App. (1997) A- " in this brief refer to the joint appendix filed in the Third Circuit in connection with the second of the two appeals, which was decided by that court in 1997. This is the same citation convention used by Commissioner Shinn in his Petition for Writ of Certiorari.

[12] (App. (1997) A-357-58, A-597-98, A-1215, A-1239.)

[13] Nor is New Jersey "simply purchasing solid waste processing services with its own dollars." Shinn Pet. at 12. The State has conceded that "New Jersey local solid waste authorities are not spending their own revenues at their own facilities." (App. (1997)

The Third Circuit's conclusion that New Jersey's activities as a market regulator take it outside the ambit of the market participant doctrine is solidly grounded in this Court's prior decisions delineating the limits of the market participant doctrine. This Court has emphasized that the market participant doctrine only permits a State to impose burdens on commerce "within the market in which it is a participant, . . . [but not] outside of that particular market." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984). A State cannot "immunize" its regulation of markets in which it is not a participant from Commerce Clause scrutiny. *Id.* at 99. *See also Wyoming*, 502 U.S. at 459-61 (State could require a publicly-owned utility to purchase in-state coal but could not impose the same obligations on privately-owned utilities). The Third Circuit, after a thorough analysis of the record, has concluded that the State here is acting as a market regulator with respect to private participants in the waste disposal market, and there is no need for further review by this Court.

Given the Third Circuit's findings, the State's suggestion that guidance from this Court is needed as to "whether *public* operation of a solid waste facility would fall within the ambit of the Commerce Clause" (Shinn Pet. at 13) raises an issue that is simply not presented by this case. Indeed, the Third Circuit noted that, in a previous decision, it in fact "has applied the market participant doctrine in the context of a publicly owned waste disposal facility." Pet. App. 36 (*citing Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990)). Its rejection of the State's market participant claim here was thus based squarely on its factual determinations as to the nature of New Jersey's involvement in the private waste flow mar-

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A-1240.) Rather, towns and private generators pay for disposal services at designated facilities at the non-competitive rates sustained by flow control. *Id.* at A-1239-1240. In the absence of flow control, towns and private generators could decide which disposal facilities to use based on competitive factors. *Id.* at A-1239.

ket, and not on any notions as to the applicability of the Commerce Clause to public facilities.

The State effectively claims to be a "market participant" in any transaction in which a private generator of waste located in New Jersey hires a private hauler to transport waste to a private disposal facility. But this theory would effectively rewrite this Court's holdings regarding the market participant doctrine so that the exception "swallow[s] up the rule" prohibiting discrimination against interstate commerce. *See South-Central Timber*, 467 U.S. at 98. This Court in *Carbone* rejected similar efforts of *amici* to characterize the town's activities as market participation,[14] concluding that the ordinance at issue there was "just one more instance of local processing requirements that we long have held invalid." *Carbone*, 511 U.S. at 391 (citations omitted). This same observation is equally true here.

This Court has squarely rejected efforts by litigants to expand the market participant exception to traditional government regulatory functions. *See Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1606-07 (1997); *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988). This case represents yet another such effort. Here, the State is using its distinctive governmental powers to regulate the market for collection, transportation, and disposal of solid waste. This is the antithesis of market participation.

Finally, the County Authorities—but not the State—contend that a conflict exists between Second Circuit and Eleventh Circuit decisions regarding the applicability of the market participant exception to flow control cases, specifically *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996), and *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala.

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[14] Brief of *Amicus Curiae* City of Springfield, Missouri in Support of Respondent at 25-26 (Aug. 23, 1993), *C & A Carbone, Inc. v. Town of Clarkstown* (No. 92-1402).

1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994). But the point of disagreement in those cases involved the application of the market participant doctrine to a voluntary contractual arrangement between a town and a contractor, not to discriminatory regulations, like those here. *Smithtown*, 66 F.3d at 514-18; [15] *Waste Recycling*, 814 F. Supp. at 1570, 1575-77. In any event, the alleged conflict between *Smithtown* and *Waste Recycling* could have been addressed by reviewing the Second Circuit's decision in *Smithtown*, but the Court declined to grant certiorari in that case.[16]

III. THE THIRD CIRCUIT'S CONCLUSION THAT PETITIONERS HAD FAILED TO JUSTIFY A TWO-YEAR POST-APPEAL STAY OF THE INJUNCTION AGAINST ITS UNCONSTITUTIONAL REGULATIONS PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT.

The State also asks this Court to review the Third Circuit's conclusion that the two-year post-appeal stay issued by the district court was improper.[17] The State frames the issue on appeal as whether the Third Circuit "err[ed] in finding that there was no federal judicial discretion remaining under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)," that would support a stay in this case. Shinn Pet. at i.

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[15] Indeed, in *Smithtown*, the court declined to apply the market participant exception to a discriminatory flow control ordinance similar to the ordinance and regulations invalidated in *Carbone* and in the decisions below. *Id.* at 512-13.

[16] The County Authorities also point to district court decisions that they contend are inconsistent with the Third Circuit's decisions in this case. County Authorities Pet. at 13-14. Conflicts for purposes of this Court's review do not result from inconsistencies between district court and Circuit Court decisions, and thus there is no occasion for granting certiorari on this ground.

[17] The County Authorities join in the State's argument, but do not argue the post-appeal stay issue separately. County Authorities Pet. at 18 n.4.

The short answer is that this is not what the Third Circuit found. Contrary to the State's contention, the Third Circuit did *not* decide categorically that federal courts lack discretion in the remediation phase of constitutional litigation, but only that such discretion may not be exercised when "the impact of the injunction is solely economic." Pet. App. 151.

Respondents argued below that this Court's recent retroactivity decisions in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), eliminated equitable discretion to postpone constitutional relief and compelled reversal of the two-year post-appeal stay. As in its Petition, the State argued that equitable discretion could still be exercised under *Chevron Oil*. *See* Shinn Pet. at 21. The Third Circuit explicitly refrained from deciding these retroactivity questions, stating: "We need not decide any of these retroactivity questions in this case." Pet. App. 151 (footnote omitted).

Instead, the court below resolved the stay issue on the specific facts of this case, holding:

> Even if we consider all of the State's justifications for a stay, we must conclude that they are insufficient to establish that a two-year post-appeal stay is an appropriate remedy for the constitutional violation involved here.

Id. at 151. It left open the possibility that a post-appeal stay might be sustained in an appropriate case, but found that this was not such a case:

> Whatever the district court's power may be to delay constitutional relief, none of the justifications raised by the defendants support the extraordinary act of delaying the injunction of an unconstitutional law.

Id. at 143 (footnote omitted).[18]

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[18] The court below further noted that the district court had issued its post-appeal stay "without developing a record. This alone com-

New Jersey raised three arguments to support the two-year post-appeal stay: first, administrative difficulties, (Pet. App. 144); second, environmental and health concerns (*id.* at 145-46); and third, the financial cost of eliminating flow control to comply with the Constitution. *Id.* at 146. The Third Circuit properly rejected each of those arguments.

The court below found no support for the post-appeal stay based on administrative difficulties, because the injunction "extends no further than N.J.A.C. § 7:26-6.5[,] . . . [and] leaves the bulk of New Jersey's waste disposal system in place. . . ." Pet. App. 144. The State and the County Authorities "have all the tools necessary to bring their waste disposal system within the ambit of the Commerce Clause." *Id.* at 145.

In fact, New Jersey recently used its regulatory powers to publish "emergency regulations" to replace its discriminatory flow control measures. 29 N.J. Reg. 4170, 4171-90 (Sept. 15, 1997). The State's issuance of these regulations confirms that the decision below was correct. The new regulations "delete the sections found unconstitutional by the [Third Circuit] as well as those sections rendered unnecessary by the repeal of waste flow . . . [and] add provisions facilitating the procurement of services in a non-discriminatory manner. . . ." *Id.* at 4171.[19]

Promulgation of these new regulations utterly defeats New Jersey's claim that the discriminatory flow control regulations cannot be "surgically removed from the body of regulations without significant repair to that which remains. . . ." Shinn Pet. at 22-23. New Jersey has performed the required surgery, as well as whatever repair

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pels us to vacate the stay as an abuse of discretion." Pet. App. 143 n.22.

[19] The deletion of the enjoined provision N.J.A.C. § 7:26-6.5 and other regulations "shall become operative as of the date of final disposition" of this case. 29 N.J. Reg. 4170, 4175.

it deemed necessary, with issuance of the emergency regulations. Adoption of these regulations proves that the absence of a stay will not result in the " 'grave disruption and inequity' " that New Jersey claims. *Id.* at 29 (citation omitted).

The Third Circuit also rejected the environmental and public health justifications for the post-appeal stay, since the injunction does not affect the provisions of New Jersey's regulatory scheme that address environmental and health concerns. Pet. App. 145-46. This Court in *Carbone* recognized that, even without flow control regulations, there are "any number of nondiscriminatory alternatives for addressing the health and environmental problems" associated with solid waste disposal—the most obvious being "uniform safety regulations enacted without the object to discriminate." *Carbone*, 511 U.S. at 393. A post-appeal stay was not deemed necessary in *Carbone* to facilitate the adoption of such regulations, and the lower court correctly concluded that none is required here, especially in light of New Jersey's demonstrated ability to promulgate amended solid waste regulations expeditiously.

The court below correctly concluded that the financial impact of remedying a constitutional violation does not justify the withholding of relief for the infringement of constitutional rights. Pet. App. 146-49. In doing so, the Third Circuit relied on this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), which held that a "State's interest in financial stability does not justify a refusal to provide relief." *Id.* at 501. As the court below concluded:

> Just as 'revenue generation is not a local interest that can justify discrimination against interstate commerce[,]' revenue generation in and of itself cannot justify court ordered perpetuation of an unconstitutional law.

Pet. App. 149 (*quoting Carbone*, 511 U.S. at 393).

Finally, federalism and separation of powers issues are not implicated by reversal of the two-year post-appeal stay. The court below did what courts are supposed to do: it enjoined the State from enforcing administrative regulations that it has found unconstitutional and from " 'implementing New Jersey's self-sufficiency policy . . . by abrogating existing valid contracts or rejecting or foreshortening contracts' " submitted for review by state authorities. Pet. App. 152-53 (citation omitted).[20] The State's premise for its federalism and separation of powers argument—that the Third Circuit's decision requires the New Jersey Legislature to fashion a remedy by "revamping New Jersey's solid waste program" (Shinn Pet. at 26; *see also id.* at i)—is untenable. The Third Circuit's decision does not require New Jersey to take any legislative action to comply with the injunction, but simply requires it to stop enforcing unconstitutional regulations and to stop implementing its discriminatory self-sufficiency policy by interfering with contracts.[21] Because no legislative action is necessitated by the Third Circuit's decision, this case raises no issue of federalism or separation of powers.

Finally, it has been three years since *Carbone* was decided by this Court, establishing the rule of law which governs this case. Three years has given New Jersey more than enough time to bring its solid waste regulations into compliance with *Carbone*, if it had chosen to do so. The Third Circuit properly concluded that, on the facts of this case, New Jersey had offered no valid justification for delaying the effective date of the injunction against enforcement of its unconstitutional flow control regulations. This essentially factual determination has no impact be-

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[20] The remaining provisions of New Jersey's solid waste statutes and regulations are not affected by the injunction. Pet. App. 153.

[21] Although the exercise of legislative functions may be necessary to correct unconstitutional conditions found to exist in state institutions, such as public schools or prisons, this is not such a case.

yond this particular case, and there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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